IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.12.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MR.JUSTICE CHITRA VENKATARAMAN

Original Side Appeal No.383 of 2002

1. M/s. Leo Oils and Lubricants,
   a partnership fir, represented
   by its partner M.V.Raghunathan
   and J.Parthasarathy

2. M.V.Raghunathan

3. J.Parthasarathy Appellants

v.

1. Bharat Petroleum Corporation Ltd.,
   Bharat Bhavan, 4 & 6, Currimbhoy Road,
   Ballary Estate, Mumbai 400 001 &
   Divisional Office at
   1, Ranganathan Gardens, 11th Main Road,
   Anna Nagar, Chennai 600 040.

2. V.D.Kumar (sole arbitrator) Respondents

The appeal filed under Order XXXVI Rule 11 of the Original Side rules read with Clause 15 of Letters Patent against the order of the learned single Judge dated 18.07.2002 made in O.P. No.834 of 1999.

For appellants : Mr.Kubendran
for M/s.Rank Associates.

For respondent 1 : Mr.R.Thiagarajan,
Senior Counsel, for
Mr.K.Ethiraj

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JUDGMENT

K.RAVIRAJA PANDIAN, J.

The appeal arises out of the order dated 18.07.2002 made in O.P. No.834 of 1999 filed under section 34 of the Arbitration and Conciliation Act to set aside the arbitral award dated 02.09.1999 of the second respondent.

2. The material facts of the case require to be stated are as follows :

The first appellant firm, represented by appellants 2 and 3, who are the partners, entered into the agreement with the first respondent Bharath Petroleum Corporation Ltd., (BPCL) for the purpose of blending lubricants on the raw materials of the base oil and additives supplied by the first respondent on 15.10.1995 (01.02.1995) for a period of three years. The agreement contained various terms including the clause for arbitration in case of dispute arising and touching upon the contract. It is stated that from July 1997 onwards, the appellant has not been blending and delivering the goods as required by the respondent. Repeated letters dated 03.07.1997, 19.07.1997, 25.07.1997, 02.08.1997, 14.08.1997 and 19.08.1997 sent by the first respondent requiring the appellant to supply blended lubricants went in vain. Hence, the respondent sought for either to return the stock of raw materials of the respondent as per the stock statement dated 03.07.1997 (Ex.B1) or the equivalent amount. As per the said stock statement dated 03.07.1997, 13,07,947.4 litres of raw materials of the respondent was available with the appellant. The amount claimed as equivalent to that stock was Rs.2,76,91,128/- along with interest at 21% per annum. Under the stated circumstances, the dispute arose and it has been referred to the sole arbitrator by the letter of the first respondent dated 23.08.1997.

3. Before the arbitrator, the first respondent filed a claim statement for return of the stock supplied by it or in the alternate, its value in a sum of Rs.2,76,91,128/- along with 21% interest from 19.08.1997. The appellant filed a reply statement to the effect that the stock statement on which the first respondent rests its claim did not reflect the actual position. There was short supply and also pilferage in transit of raw materials from 01.02.1995. Even prior to 01.02.1995, from 1993 to 1995 an extent of 467 kilo litres was in short supply. From April 1997 onwards, the first respondent suspended the supply of raw materials and also payment towards blending charges amounting to Rs.6,00,000/- in respect of periods earlier to the dispute. Because of the non supply of raw materials, the appellant sustained huge loss. On that basis, the appellant not only sought to dismiss the claim but made a counter claim against the respondent in a sum of Rs.339.25 lakhs with interest @ 21%. The arbitrator, by his award impugned before the learned single Judge, directed the appellant to return the materials shown in the stock statement

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dated 03.07.1997 or in default to pay the value of the materials, viz., Rs.2,76,91,128/- less a sum of Rs.3,26,707.61 due to the appellant, i.e., Rs.2,73,64,420.39 with interest @ 15% with effect from 19.08.1997 till the payment of the said amount in addition to the cost of the first respondent. The appellant herein questioned the correctness of the award by filing an application under section 34 of the Act before the learned single Judge, who by reason of the impugned order, dismissed the application with the cost in a sum of Rs.5000/-. The correctness of the said order is now canvassed before this Court.

4. Mr.Kubendran, learned counsel for the appellant submitted that the appellant was carrying on blending based on the supply received from the first respondent. However, the first respondent started building up correspondence to the effect that the appellant had substantial stocks, when none was available. A representative of the first respondent was overseeing the operations of the appellant. Stocks were being accounted on volume basis by the respondent. The major factors which resulted in loss of stocks, such as transit loss, pilferage and shortage have not been taken into account either by the arbitrator or by the learned single Judge. The rough and unreconciled stock statement, Ex.B1 given by the appellant has been taken as the base for the claim, which cannot be legally sustained. The arbitrator was biassed and did not act in a fair manner. The order of the arbitrator was not only arbitrary in nature, but also against the public policy.

5. Learned counsel for the appellant relied on the decisions of the Supreme Court in (1) Central Bureau of Investigation v. V.C.Shukla, AIR 1998 SC 1406; (2) Chandradhar Goswami v. Gauhati Bank Ltd., AIR 1967 SC 1058; (3) Pullangoda Rubber Produce Co. Ltd. v. State of Kerala, 1972-4-SCC-683; (4) Rajasthan State Mines and Minerals Ltd. v. Eastern Engg. Enterprises, AIR 1999 SC 3627; (5) Prem Ex Serviceman Co-op Tenant Farming Society Ltd. v. State of Haryana, AIR 1974 SC 1121; and (6) ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705.

6. Per contra, Mr.R.Thiagarajan, learned senior counsel appearing for the first respondent submitted that the entire dispute between the parties is pure and simple question of fact. In the absence of any refutal on the part of the appellant with materials having some evidentiary value, it cannot contend that the statement of accounts furnished by it monthwise cannot be taken as a base for the claim. The appellant was not able to place any material worth-mentioning either before the arbitrator or before the learned single Judge to support its contention that the stock statement does not reflect the real position. The further case of counter claim before the arbitrator and before the learned single Judge that the alleged loss sustained by the appellant by way of shortage of supply, pilferage in transit was not substantiated with relevant materials. The situations stated in section 34 of the Act has been raised as a ground, however, without any basis only for the sake of filing the appeal. There is absolutely no merit in the case of the appellant to maintain the appeal. The appeal deserves

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to be dismissed.

7. We heard the learned counsel on either side and perused the materials available on record and also gone through the judgments relied on by the learned counsel for the appellant.

8. The judgment of the Supreme Court in the case of Central Bureau of Investigation v. V.C.Shukla, AIR 1998 SC 1406 was relied on for the proposition that on the basis of the books of accounts, liability cannot be fixed, in the absence of independent evidence of trust-worthiness to support the account. In that case, the Supreme Court has held that since an element of self interest and partisanship of the entrant to make a person liable could not be ruled out when the entries were made behind the back and without knowledge of the person against whom such a claim was made, the additional safeguards of insistence upon other independent evidence to fasten him with such liability is necessary as provided for in section 34 of the Evidence Act.

9. The decision in the case of Chandradhar Goswami v. Gauhati Bank Ltd., AIR 1967 SC 1058 is to the effect that as per section 34 of the Evidence Act, the appellant could not be saddled with the liability of certain sum said to have been advanced on the basis of mere entry in the account. Such an entry shall not be sufficient evidence and some more independent evidence had to be given by the bank to show that the amount was advanced. We are at a loss to understand as to how the above said judgment would advance the case of the appellant. Here is a case in which the stock statement has been maintained by the appellant firm itself and it has been furnished to the respondent monthwise. The stock statement dated 03.07.1997 is in respect of closing stock of the raw materials supplied by the respondent furnished by the appellant itself for the month of June, 1995. In addition to that, the respondent by its letter dated 03.07.1997 has specifically stated that 8,37,208 litres of base oil and 18409 kg of additives supplied by the first respondent to the appellant were with the appellant that the appellant neither returned the lubricant after blending or returned the said quantity of base oil and additives that when requested the appellant to return within 3 days along with 1563 numbers of drums lying with the appellant. the appellant, by its letter dated 08.07.1997, has alleged that the respondent has restricted the supply of raw materials in the month of April 1997 and stopped supply from the month of May, 1997 for blending and stated the return of the base oil and additives as well as the drums is unrealistic. Nowhere it is refuted or denied by the appellant that the base oil and additives mentioned in the stock statement for the month of June, 1997 dated 03.07.1997 are not available with it either due to alleged short supply, pilferage or in transit loss. The respondent sent another letter on 19.07.1997 reiterating return of the base oil and additives as mentioned in the earlier letter dated 03.07.1997 by making mention that the appellant had not blended lubricant oil while there was sufficient stock of the base oil and additives as mentioned in the letter of 03.07.1997. Even to this, the appellant by letter dated 25.07.1997 admitted

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that the stock as claimed by the first respondent were with it, that the total quantity could not be blended as stated by the respondent, and that there was no valid reason for demanding the stock of the respondent. On the face of the above stated evidence by which it has been admitted by the appellant itself without any demur and uncertain terms that the stocks were available with it, reliance placed on the above decision is not of any use to the appellant.

10. In the case of Pullangoda Rubber Produce Co. Ltd. v. State of Kerala, 1972-4-SCC-683, which arises out of Kerala Agricultural Income Tax Act, the apex Court ruled that no doubt it was true that the entries in the account books of the assessee amounts to admission that the amount in question was laid out or expended for the purpose of cultivation, upkeep or maintenance or immature plants from which no agricultural income was derived during the previous year and further observed that the admission was an extremely important piece of evidence but it could not be said that was conclusive. It was open to the person who made the admission to show that it was incorrect. It is also often said that admitted fact need not be proved as per Evidence Act. But when confronted with the admission, it is well open to the person to refute the same. The decision relied on to contend that it is well settled that admitted fact need not be proved and the admission depends upon the circumstances in which it was made in the case of Prem Ex-serviceman Co-op Tenant Farming Society Ltd. v. State of Haryana, AIR 1974 SC 1121 also does not advance the case of the appellant, for the following reasons.

11. In the case on hand, though it was asserted by the appellant that the stock statement dated 03.07.1997 was not reflecting the real position, the appellant has not adduced any evidence supporting the same. Hence, that judgment also does not in any way advance the case of the appellant.

12. The next judgment in the case of Rajasthan State Mines and Minerals Ltd. v. Eastern Engg. Enterprises, AIR 1999 SC 3627 was relied on to contend that the arbitrator has no jurisdiction to arbitrate the proceedings on the ground that the arbitrator was a nominee of the person to whom reference has been made. Hence, the award has to be set aside. Here again, we are not able to countenance the arguments of the learned counsel for the appellant for the reason that by letter dated 23.08.1997, the respondent referred the matter to the Director (Marketing), BPCL, Mumbai for adjudication. The relevant clause read as follows :

> In the circumstances aforesaid, disputes or differences have arisen between the parties in relation to the agreement mentioned hereinabove and in the circumstances aforesaid and in terms of the arbitration clause contained in the agreement mentioned hereinabove, we hereby request you either to adjudicate or to nominate any other person to adjudicate the following disputes arising between the parties :
>
> a. to direct Leo to return the material of

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the Corporation lying in their custody as mentioned in the Declaration submitted by them on 3rd July, 1997;

b. alternatively to pay the value of the said material mentioned in the Declaration submitted by them on 3rd July, 1997 together with interest thereon at the rate of 21% per annum calculated from 19th August, 1997 till the date of payment thereof.

c. other incidental claims and costs.

13. The arbitration clause contained in the agreement provides that any dispute or difference of any nature whatsoever, any claim, cross claim, counter claim or set off of the company against the contractor or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to the agreement shall be referred to the sole arbitration of the Director (Marketing) of the company or of some officer of the company who may be nominated by the Director (marketing).

14. It could be seen from paragraph 3 of the award that the dispute or difference arose between BPCL and Leo and as per the said agreement, the BPCL by their letter dated 23.08.1997 referred the said dispute to the Director (Marketing), BPCL for adjudication whatsoever either by himself or to nominate an officer of BPCL to adjudicate the same. Pursuant to such reference, the Director (Marketing), by his letter dated 28.08.2007 expressed his inability to adjudicate the dispute referred to him by BPCL's aforesaid letter by himself and nominated the arbitrator being the then General Manager (Special Project) to adjudicate the dispute mentioned in paragraph 5 of the letter dated 23.08.1997.

15. Thus, the arbitration clause itself provided for adjudication of the dispute by the sole arbitration of the Director (Marketing) of BPCL or some other officer of the Company who may be nominated by the Director (Marketing). Pursuant to the same, reference has been made to the Director (Marketing) dated 23.08.1997 either to adjudicate by himself or to nominate the other person for adjudication. Accordingly, the Director (Marketing) nominated an arbitrator, which is strictly in accordance with the arbitration clause and as such the arbitrator, who has been duly nominated by the Director (Marketing) cannot be regarded as not having jurisdiction to arbitrate the dispute.

16. The last of the decisions in the case of ONGC v. Saw Pipes, (2003) 5 SCC 705 relied on for the proposition that the arbitral award is against public policy. In that case, the apex Court, while considering what is the meaning of public policy of India as contained in section 34(2)(b)(ii) of the Act, has held that the Court can set aside the award if it is contrary to :

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1. a. fundamental policy of Indian law; or
b. the interest of India;
c. justice or morality, or
2. is patently illegal
3. is unfair or unreasonable so as to shock the conscience of the Court.

None of the above said situation or circumstance is available in the case on hand and thus the ruling has no application to this case.

17. On the face of closing stock statement dated 03.07.1997 for the month of June 1997, which formed the basis for quantification of the loss and in the absence of any material evidence to sustain the claim that the statement did not reflect the correct position, and further there is no refutal against the statement and rather admitted in unambiguous terms, the appellant could not be allowed to say that the award passed is contrary to the public policy, which is stated as one of the grounds to set aside the award under section 34(2)(b)(ii) of the Act.

18. For all the reasons stated in the foregoing paragraphs, the appeal deserves to be dismissed and is dismissed. No costs. The connected miscellaneous petition is dismissed consequently.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

mf

To
1. The Sub Assistant Registrar,
Original Side,
High Court, Madras.

2. The Section Officer, VR Section,
High Court, Madras.

+ 1 CC To M/s.Rank Associates, SR NO.74335/07.

+ 1 CC To Mr. K.Ethiraj, Advocate SR NO.74098/07

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